

Citizen Suits in California

California Association of Sanitation Agencies

Summary

Over the past several years, California local governments have faced a flurry of Clean Water Act citizen suits for sanitary sewer overflows and alleged stormwater permit violations. The suits are brought by a handful of plaintiffs' attorneys on behalf of a number of environmental organizations. Multi millions of dollars of ratepayer revenues are being paid out each year in the form of attorneys fees, mitigation projects and costs to implement capital and operational programs required under consent decrees. CASA does not believe these suits yield a corresponding water quality benefit commensurate with defending, settling and complying with these decrees.

Background

There is no question that citizen enforcement has played an important role in the implementation of the Clean Water Act and other environmental statutes. Congress envisioned that the role of the citizen lawsuit would be to supplement, not supplant, the primary enforcement function of the States and the federal government. In recent years in California, however, we have seen a cottage industry develop in which plaintiffs' attorneys file citizen suit after citizen suit against numerous local agencies without regard to the magnitude or the environmental impact of the alleged violations, and despite the fact that communities may already be taking steps to rectify their situations, either voluntarily or because the State or USEPA has already undertaken administrative enforcement action.

By far the most popular focus of citizen suits against local wastewater agencies is unpermitted discharges of untreated wastewater from sewer collection systems.¹ EPA and the State have taken the position that no sanitary sewer overflows that reach waters of the U.S. (regardless of volume, cause, or lack of environmental impact) can be permitted. It is also widely accepted that not all SSOs can be prevented, even in the best maintained, operated and managed system. This places local government in a no-win situation. Defenses are extremely limited, and as explained below, one of the key defenses that Congress provided has been rendered largely ineffective by Ninth Circuit case law.

The suits are not frivolous in the legal sense. They involve at least some undisputed violations of the CWA. However, they also cannot fairly be characterized as serving the supplemental enforcement role that Congress

¹ Suits against cities, counties and small businesses for stormwater violations are also widespread. This paper focuses on the sanitary sewer overflow suits as these directly affect CASA's member agencies..

intended—at least not in California. The problem, in a nutshell, is that the diligent prosecution bar written into the Act is not effective.

The Problem

Congress specified that no citizen suit could be maintained where the State or the USEPA is “diligently prosecuting” an action against the alleged violator. Given the time it takes to process a State enforcement action, the fact that the State is already “diligently prosecuting” is not enough to bar a citizen suit. In addition, the Ninth Circuit has determined that only a State enforcement action requiring the payment of monetary penalties will serve as a defense to a citizen lawsuit. In most parts of the country, if the state has issued an enforcement order, a citizen suit is barred by Clean Water Act section 309(g)(6). (See, e.g., *North and South Rivers Association, Inc. v. Town of Scituate*, (1st Cir. 1991) 949 F.2d 552.) This is not the case in states such as California, which are within the jurisdiction of the Ninth Circuit Court of Appeals. The Ninth Circuit has opined that unless an enforcement order includes an assessment of monetary penalties, the citizen suit is not barred by Clean Water Act section 309(g)(6). (*Citizens for a Better Environment v. Union Oil*, (9th Cir. 1996) 83 F.3d 1111.) Because achieving compliance rather than punishment is generally the goal of water quality enforcement actions against public agencies, the State or EPA will often choose not to require payment of monetary penalties preferring to allow the agency to spend its limited resources on fixing the problem. The *Union Oil* case is a significant factor in the increase in “nuisance” citizen litigation in California. Due to this split among the federal courts, the Clean Water Act is not being implemented equitably across the country.

Possible Reforms

The reforms seek to restore the primary role of EPA and the states in enforcement. These include:

- Clarify that where the State has initiated an administrative enforcement action for violations under comparable state law, citizen litigation for the same event or substantially similar violations is barred, whether or not the State action included the assessment of monetary penalties.
 - Sections affected: Clean Water Act sections 309(g)(6) (33 U.S.C. §1319(g)(6)) and 505(b) (33 U.S.C. §1365(b))
 - Type of administrative enforcement action that triggers the citizen litigation bar:
 - Order requiring actions to be taken to achieve compliance;
 - Order imposing monetary administrative penalty
 - Administrative enforcement action pertains to the same event or substantially similar violations²

² This would resolve the situation where a state has issued an enforcement order for an event

- If the administrative enforcement action applies to a particular event (e.g., exceedance of effluent limitation or a sanitary sewer spill), all citizen litigation is barred for the event even if the citizen litigation might allege violation of different or additional permit provisions or include claims not sought by the administrative agency.
 - If the citizen litigation seeks relief based on alleged violations that arise from the same nucleus of operative fact as those included in an administrative enforcement action, the citizen litigation will be barred.
- Timing of commencement of administrative enforcement action
 - When administrative agency publicly issues the draft order, notice, or requirement
- Completion of administrative enforcement action
 - Within one (1) year of commencement
- Notice Requirements, Time to Cure, and Effect of Diligent Prosecution During Notice Period
 - Sections affected: Clean Water Act sections 309(g)(6) (33 U.S.C. §1319(g)(6)) and 505(b) (33 U.S.C. §1365(b))
 - Revise the Act to increase the statutory notice period from 60 to 180 days so as to allow adequate time for the regulatory agencies to investigate and commence an enforcement action.
 - Revise the Act to specifically preclude citizen litigation if diligent prosecution described above occurs anytime between issuance of the Notice Letter and filing of the Complaint.

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citing violations but the citizen suit is filed citing some different/ additional permit provisions, and avoiding the citizen suit bar because citizen suit seeking relief for separate alleged violations. This situation does occur, even in cases where the state seeks to impose a penalty. In 2012, the Central Valley Regional Board was nearing completion of an enforcement action against the City of Redding requiring payment of \$1.4 million when the California Sportfishing Protection Alliance filed a 60 day notice letter of intent to sue over the same violations. Despite the fact that the Regional Water Board process was public, and CSPA had an opportunity to participate in the administrative process and hearing, they filed a lawsuit anyway.

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